88-2113

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRELL JOHNSON,
Petitioner,

VS.

VINCENT WILLIAMS-EL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES J. WILSON
City Counselor
EDWARD J. HANLON
Associate City Counselor
*JULIAN L. BUSH
Associate City Counselor
SHERYL Y. JOHNSON
Associate City Counselor
Room 314 City Hall
St. Louis, MO 63103
(314) 622-3361
Attorneys for Petitioner

*Counsel of Record

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTION PRESENTED

Whether the doctrine of *Parratt v. Taylor* is applicable to the random and unauthorized punishment of a pretrial detainee.

PARTIES BELOW

The parties in the court of appeals were the petitioner, Darrell Johnson, the respondent Vincent Williams-El, and appellees Sam Smith, Claude Woodson, Mrs. Harris, George Kinsey, Rosemary Terranova, and the City of St. Louis. The judgments in favor of appellees Smith, Woodson, Harris, Kinsey, Terranova, and the City were affirmed on appeal and therefore they do not join in this petition.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRELL JOHNSON,
Petitioner,

VS.

VINCENT WILLIAMS-EL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes now Darrell Johnson, petitioner, and respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit filed in this case April 5, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed April 5, 1989, and is reported as *Williams-El v. Johnson,* 872 F.2d 224 (8th Cir. 1989).

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered April 5, 1989. Respondent's petition for rehearing directed at the judgment in favor of petitioner's co-defendants and co-appellees was overruled May 1, 1989. Petitioner's peti-

tion for rehearing was denied May 16, 1989. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(i).

CONSTITUTIONAL PROVISION

U.S. Const., Amend, XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action commenced in July 2, 1986 when respondent filed a complaint in the United States District Court for the Eastern District of Missouri, alleging claims arising under 42 U.S.C. §1983. Jurisdiction in the district court was predicated on 28 U.S.C. §1343(3), 28 U.S.C. §1343(4), and 28 U.S.C. §1331. The facts stated herein are drawn from the opinion of the United States Court of Appeals for the Eighth Circuit. References are to that opinion, as reproduced in the appendix.

The facts may be stated succinctly. Repondent was a pretrial detainee at the St. Louis Municipal Jail, awaiting sentencing for murder. Petitioner was a correctional officer at the jail. There was an altercation between the two. Respondent testified that petitioner, without provocation, pulled respondent to the floor, and punched him several times, causing respondent to suffer a split lip and a minor bruise to his back. Appendix, A-3 - A-4. Petitioner testified that he punched respondent in self-defense. Appendix, A-5.

Respondent sued petitioner and several supervisors, both for his injuries and for failing to give him appropriate medical care.

The district court granted directed verdicts in favor of all of the defendants, either at the close of plaintiff's case, or at the close of all of the evidence.

Respondent appealed the judgment entered on the directed verdicts. The court of appeals sustained the verdicts, save that rendered in favor of petitioner. Petitioner had staked his defense of the directed verdict on the doctrine of *Parratt v. Taylor,* 451 U.S. 527 (1981). Petitioner argued that respondent's claim was one sounding in procedural due process and argued that, since the alleged beating was never claimed or proven to be other than random and unauthorized, the state tort remedies that were conceded to be available provided respondent with all of the process that respondent was due.

The court of appeals, however, rejected petitioner's characterization of the pretrial detainee's right to be free from punishment as one protected by the Due Process Clause in its procedural aspect rather than in its substantive aspect:

> We do not accept the defendants' characterization of the issue. Prison-beating and police-brutality cases have long been brought under the Due Process Clause as violations of substantive, not procedural, due process. These cases involve deprivations of liberty that cannot be legitimized no matter how much process is given. See, *e.g., Burton v. Livingston,* 791 F.2d 97, 100-01 (8th Cir. 1986); *King v. Blankenship,* 636 F.2d 70, 72-73 (4th Cir. 1980); *Johnson v. Glick,* 481 F.2d 1028, 1032-33 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973); *Collum v. Butler,* 421 F.2d 1257, 1259 (7th Cir. 1970); *Talley v. Stephens,* 247 F.Supp. 683 (E.D. Ark. 1965). If we were to hold that these injuries were compensable only under state law, then there could be no more §1983 actions to reform prison systems.
>
> Appendix, A-9.

Thus ruling, the court of appeals remanded the case for a new trial of respondent's claim against petitioner.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

In *Hudson v. Palmer,* 468 U.S. 517 (1984), this Court held that a prison inmate's right not to be deprived of his property without due process of law was not offended when a prison officer, in a random and unauthorized act, intentionally destroyed the inmate's property, because the prisoner had available state tort law process to compensate him for his injury. In the opinion in the case at bar, the Eighth Circuit held that a pretrial detainee's right not to be deprived of his liberty without due process of law was offended when a prison officer, in a random and unauthorized act, intentionally punched the detainee, splitting the detainee's lip and causing a minor bruise to his back, despite the detainee having available state tort law process to compensate him for his injury. In reaching this conclusion, the Eighth Circuit decided that the doctrine of *Parratt v. Taylor,* 451 U.S. 527 (1981), upon which *Hudson* was based, was inapplicable to pretrial detainees. The question of whether or not the court correctly decided that issue is an important and unsettled question of federal law, as are the three subsidiary questions implicated: 1) whether the *Parratt* doctrine is applicable to deprivations of liberty; 2) whether the *Parratt* doctrine is applicable to substantive due process; and 3) whether the punishment of pretrial detainees implicates substantive due process or procedural due process.

I.

The Question Of Whether The Doctrine Of *Parratt v. Taylor,* 451 U.S. 527 (1981) And *Hudson v. Palmer,* 468 U.S. 517 (1984) Applies To Cases Involving Deprivations Of Liberty, As Held Below, Is An Important And Unsettled Question Of Federal Law Upon Which The Circuits Are Split And One That Ought To Be Settled By This Court.

Two important subsidiary questions, one of which involves a conflict among the circuits, must be determined as prerequisites

to the determination of the principal question presented by this petition. First, the Eighth Circuit holds, and this petition presumes, that the *Parratt* doctrine is equally applicable to cases involving liberty interests, such as the case at bar, as to cases involving property interests, such as *Parratt* and *Hudson*. In so holding, the Eighth Circuit affirms its earlier decision in *Birkenholz v. Sluyter,* 857 F.2d 1214 (8th Cir. 1988), joins with the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, and parts company with the Second, Third, Tenth, and possibly Ninth Circuits. Compare *Daniels v. Williams,* 748 F.2d 229, 232 (4th Cir. 1984) (en banc), aff'd on other grounds, 474 U.S. 327 (1986); *Thibodeaux v. Bordelon,* 740 F.2d 329, 336-337 (5th Cir. 1984); *Wilson v. Beebe,* 770 F.2d 578, 584 (6th Cir. 1985) (en banc); *Toney-El v. Franzen,* 777 F.2d 1224, 1227-1228 (7th Cir. 1985) (en banc), *cert. denied,* 476 U.S. 1178 (1986); and *Burch v. Apalachee Community Mental Health Services, Inc.,* 804 F.2d 1549, 1555 (11th Cir. 1986) (en banc), with *Conway v. Village of Mount Kisco,* 758 F.2d 46, 48 (2nd Cir. 1985), cert. dismissed as improvidently granted, 479 U.S. 84 (1986); *Davidson v. O'Lone,* 752 F.2d 817, 828 (3rd Cir. 1984), reversed on other grounds, *Davidson v. Cannon,* 474 U.S. 344 (1986); and *Lusby v. T. G. & Y. Stores, Inc.,* 749 F.2d 1423, 1434 (10th Cir. 1984), *cert. denied,* 474 U.S. 818 (1985), reh'd 474 U.S. 1014 (1985); and with *Haygood v. Younger,* 769 F.2d 1350, 1356 (9th Cir. 1985) (en banc), *cert. denied,* 478 U.S. 1020 (1986). This Court has not yet decided this question, although Justice Blackmun has suggested that he believes that the *Parratt* doctrine is inapplicable to liberty interest cases. *Parratt,* 451 U.S. 545 (Blackmun, J., concurring).

II.

The Question Of Whether The Doctrine Of *Parratt v. Taylor*, 451 U.S. 527 (1981) And *Hudson v. Palmer*, 468 U.S. 517 (1984) Applies To Cases Involving Substantive Due Process, Or Whether The Doctrine Is Confined To Cases Involving Procedural Due Process, As Held By The Court Below, Is An Important And Unsettled Question Of Federal Law That Ought To Be Settled By This Court.

A second subsidiary question, also important and unsettled, but not involving a split among the circuits, is whether the *Parratt* doctrine is confined to procedural due process cases. In the opinion below, the Eighth Circuit so holds, thus affirming its earlier opinion in *Wilson v. City of Little Rock*, 801 F.2d 316, 321 (8th Cir. 1986). In so holding, the Eighth Circuit joins most of the other federal courts of appeals. See *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982); *Morello v. James*, 810 F.2d 344, 348 (2nd Cir. 1987); *Riley v. Jeffes*, 777 F.2d 143, 147-148 (3d Cir. 1985); *Daniels v. Williams*, 720 F.2d 792, 796 n.3; *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984); *Watts v. Burkhart*, 854 F.2d 839, 842 (6th Cir. 1988); *State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1147 n.5 (7th Cir. 1983), *cert. denied*, 464 U.S. 995 (1983); *Smith v. City of Fontana*, 818 F.2d 1411, 1415 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 311 (1988); *Lavicky v. Burnett*, 758 F.2d 468, 472 n.1 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); and *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1497-1500 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 (1986). However, the Eighth Circuit has acknowledged that the applicability of *Parratt* to substantive due process claims remains unclear, *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986), disavowed in other respects in *Lemke v. Cass County, Nebraska*, 846 F.2d 469 (8th Cir. 1987) (en banc), and two recent state appellate decisions holding that *Parratt* is applicable to substantive claims confirm that this question remains unsettl-

ed. See *Brown v. City of Colorado Springs,* 749 P.2d 475, 477 (Colo. App. 1987) and *Massey v. Shepack,* 12 Kan. App. 770, 757 P.2d 329 (1988). In this Court, Justice Stevens, joined by Justice Brennan, Justice Marshall, and Justice Blackmun, has indicated that he believes that *Parratt* does not apply to substantive due process cases, see *Hudson v. Palmer,* supra, 468 U.S. at 541 n.4 (Stevens, J., concurring in part and dissenting in part) and *Daniels v. Williams,* supra, 474 U.S. at 337-340 (Stevens, J., concurring). However, a majority of the Court has not yet made its opinion known.

III.

The Question Of Whether The Punishment Of Pretrial Detainees Implicates Procedural Due Process, And Thus Is Subject To The Doctrine Of *Parratt v. Taylor,* 451 U.S. 527 (1981) And *Hudson v. Palmer,* 468 U.S. 517 (1984), Or Whether The Punishment Of Pretrial Detainees Implicates Substantive Due Process, And Thus Is Not Subject To The Strictures Of That Doctrine, Is An Important And Unsettled Question Of Federal Law That Ought To Be Settled By This Court.

Should the Court determine the two subsidiary issues in the same manner as the court below, the Court will reach the primary issue raised by this petition: Whether the punishment of a pretrial detainee implicates procedural due process such that available adequate state tort remedies provide all of the process that the detainee is due or whether the punishment of such detainees implicates substantive due process such that a constitutional violation occurs even where the infliction of the punishment is random and unauthorized and state tort law provides a process by which the detainee may be compensated for the injury that the detainee suffers when he is punished. This is a very important issue, as this Court's recent opinion in *Graham v. Connor,* 57 U.S.L.W. 4513 (1989) shows.

In *Graham,* the Court rejected the "notion that all excessive force claims brought under §1983 are governed by a single

generic standard." *Id.* at 4515. Excessive force in subduing arrestees is governed by a Fourth Amendment standard, *id.* at 4516; excessive force in subduing convicts is governed by an Eighth Amendment standard, *id;* and excessive force in subduing pretrial detainees is governed by a Due Process standard. *Id.* Police officers and federal courts are protected from insubtantial suits brought by arrestees because not every push or shove is an unreasonable seizure, *id,* and prison officials and federal courts are protected from insubstantial suits brought by convicts because such cases may be brought, by definition, only where the convict is subjected to force that is cruel and unusual or, at least, subjected to the unnecessary and wanton infliction of pain. *Whitley v. Albers,* 475 U.S. 312 (1986). It is otherwise, however, with pretrial detainees and their jailors.

The Due Process Clause prohibits the punishment of pretrial detainees. *Bell v. Wolfish,* 441 U.S. 520, 535 (1979). Thus any conduct directed at a detainee that is sufficiently unpleasant that it may be said to constitute punishment will implicate the Due Process Clause and form the predicate for a §1983 action in federal court. Every push and every shove, and a lot of conduct of even less severity, perhaps even including harsh words, is punishment. And unless the *Parratt* doctrine or something like it is applicable to such cases, jailors of pretrial detainees and federal courts will stand helpless before an onslaught of petty cases. Whether or not the Constitution demands that such an onslaught go forward is an important and unsettled question of law.

Whatever the proper determination of that question of law, it is plain that the lower court's analysis cannot withstand scrutiny. The court reached its result by reasoning *a posteriori.* The court believed that if it held that the *Parratt* doctrine was applicable to pretrial detainees, "then there could be no more §1983 actions to reform prison systems," and, evidently, that there could be no more prison-beating or police-brutality cases. Appendix, A-9. Rejecting that conclusion as unacceptable, the

court proceeded to reject the premise — that the *Parratt* doctrine is applicable to pretrial detainee cases — that the court believed compelled that conclusion. As this Court's opinion in *Graham v. Connor* demonstrates, the Eighth Circuit's analysis is defective.

The Eighth Circuit's belief that prison-beating and police-brutality cases would be in jeopardy was predicated on the same error condemned in *Graham v. Connor*: the Eighth Circuit treated all excessive force cases as fungible. Thus, it misrelied upon *Burton v. Livingston,* 791 F.2d 97 (8th Cir. 1986), *King v. Blankenship,* 636 F.2d 70 (4th Cir. 1980), and *Talley v. Stephens,* 247 F.Supp. 683 (E.D. Ark. 1965), all of which concerned convicts, and which are properly considered Eighth Amendment cases, and the Eighth Circuit misrelied on *Collum v. Butler,* 421 F.2d 1257 (7th Cir. 1970), which concerned an arrest, and which is properly considered a Fourth Amendment case. The Eighth Circuit also erred in believing that there could be no more actions to reform conditions in prisons where pretrial detainees are confined; such cases, by definition, concern deprivations visited pursuant to established state procedures and thus fall within the exception to *Parratt* carved out in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). See *Hudson v. Palmer,* supra, 468 U.S. at 541 n.4 (Stevens, J., concurring in part and dissenting in part) (*Parratt* has no application to a case where it is contended that the established prison procedures themselves created an unreasonable risk that prisoners will be unjustifiably deprived of their property).

The issue, then, ought to be determined on its merits, without the impediment of these confusions. Such an examination yields the following. Procedural due process requires the government to follow appropriate procedures before depriving a person of his life, liberty, or property; substantive due process prohibits certain government actions without regard to the procedures used to implement them. *Daniels,* supra, 474 U.S. at 331. *Bell v. Wolfish,* supra, the landmark case recognizing the

pretrial detainee's due process right to be free from punishment, clearly rests upon the failure to afford the detainee process, namely, an adjudication, prior to the imposition of punishment: "For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.*, 441 U.S. at 535. This is made even more clear in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), a case upon which *Bell v. Wolfish* relies. See *Bell v. Wolfish,* 441 U.S. at 536. At issue in *Mendoza-Martinez* were statutes providing for the forfeiture of citizenship by those who have left or remained outside the United States to evade military service. Finding that the forfeitures constituted punishment, the Court held that the statutes violated the Due Process Clause because the forfeitures were imposed without prior court or administrative proceedings. *Mendoza-Martinez,* 372 U.S. at 163-170. The Court expressly characterized the case as involving "procedural due process," *id.*, 372 U.S. at 165, and the statutes as failing because of the failure to provide "procedural safeguards." *Id.*, 372 U.S. at 166.

Thus, it appears that the punishment of a pretrial detainee is properly characterized as a procedural due process case. Certainly, if the government may inflict corporal punishment upon school children, see *Ingraham v. Wright,* 430 U.S. 651 (1977), and, certainly, if the government can punish murderers by taking away their lives, *Gregg v. Georgia,* 428 U.S. 153 (1976), there is nothing that stands in the way of punishing adult murderers, like respondent, by punching them several times, rather than by executing them, provided that murderers receive appropriate process. Therefore, pretrial detainees complaining that they have been unconstitutionally punished must be claiming that they have been punished without being afforded the appropriate process. That is, they are making procedural due process claims.

In so characterizing such claims, petitioner acknowledges that there is language in *United States v. Salerno,* 481 U.S. ____, 95

L.Ed.2d 697, 107 S.Ct. ____ (1987) that may be construed as indicating that the Court accepted the contention that pretrial punishment constitutes a substantive due process violation. See *id.*, 95 L.Ed.2d at 708-710. Petitioner submits that that language was used arguendo. After all, if one can transmute what appears to be a rule requiring procedural due process — the government may punish you but only if it first convicts you at trial — into a rule of substantive due process by merely articulating it differently — the government may never punish you if it has not afforded you a trial — every procedural due process case can be rearticulated as a substantive due process case. Consider, for example, cases involving the termination of public employees and cases imposing restrictions upon inmates, perhaps the two most often litigated procedural due process cases today. Can one convert into a rule of substantive due process the holding of *Cleveland Board v. Loudermill,* 470 U.S. 532 (1985) that the government may terminate a tenured public employee only if it provides him with a pretermination hearing — merely by rearticulating the rule as follows: the government may never, under any circumstance, terminate a public employee without providing him with a pretermination hearing? Similarly, can one convert into a rule of substantive due process the holding in *Hewitt v. Helms,* 459 U.S. 460 (1983) — that a prisoner may be removed from the general prisoner population and confined to administrative segregation only where there has been evidentiary review — merely by rearticulating the rule as follows: the government may never, under any circumstance, remove a prisoner to segregation without evidentiary review? If so, every procedural due process case can be converted to a substantive due process case simply by rearticulation: "The government may not, under any circumstance, deprive a person of his life, liberty, or property, unless it affords him process." Indeed, efforts to thus rearticulate procedural due process claims as substantive due process claims, for the purpose of evading *Parratt* and *Hudson,* are beginning to appear with some frequency in the reporters. See, e.g., *Weimer v. Amen,* 870

F.2d 1400, 1405-1406 (8th Cir. 1989) (holding fraudulent and illegal acts of state banking official random and unauthorized and thus subject to *Parratt* and further rejecting characterization claims as sounding in substantive due process); *Schaper v. City of Huntsville,* 813 F.2d 709, 715-788 (5th Cir. 1987) (holding alleged conspiracy to deprive plaintiff of right to requisite pretermination hearing random and unauthorized and thus subject to *Parratt* and, while recognizing substantive due process right in continued employment, rejecting proposition that arbitrary and capricious denial of pretermination hearing works substantive due process violation).

By artful pleading, not only *Parratt* and *Hudson* disappear, but all procedural due process cases disappear, leaving only substantive due process. See Monaghan, *State Law Wrongs, State Law Remedies, and The Fourteenth Amendment,* 86 Colum. L.Rev. 979, 994 (1986) ("If . . . a plaintiff can *always* make a substantive due process challenge for arbitrariness, *Parratt* and *Hudson v. Palmer* are overruled completely.") (emphasis in original). And since it is procedural due process that is more firmly anchored in the text of the constitution, *Bowers v. Hardwick,* 478 U.S. 186, 191 (1986), this is a very odd result indeed.

CONCLUSION

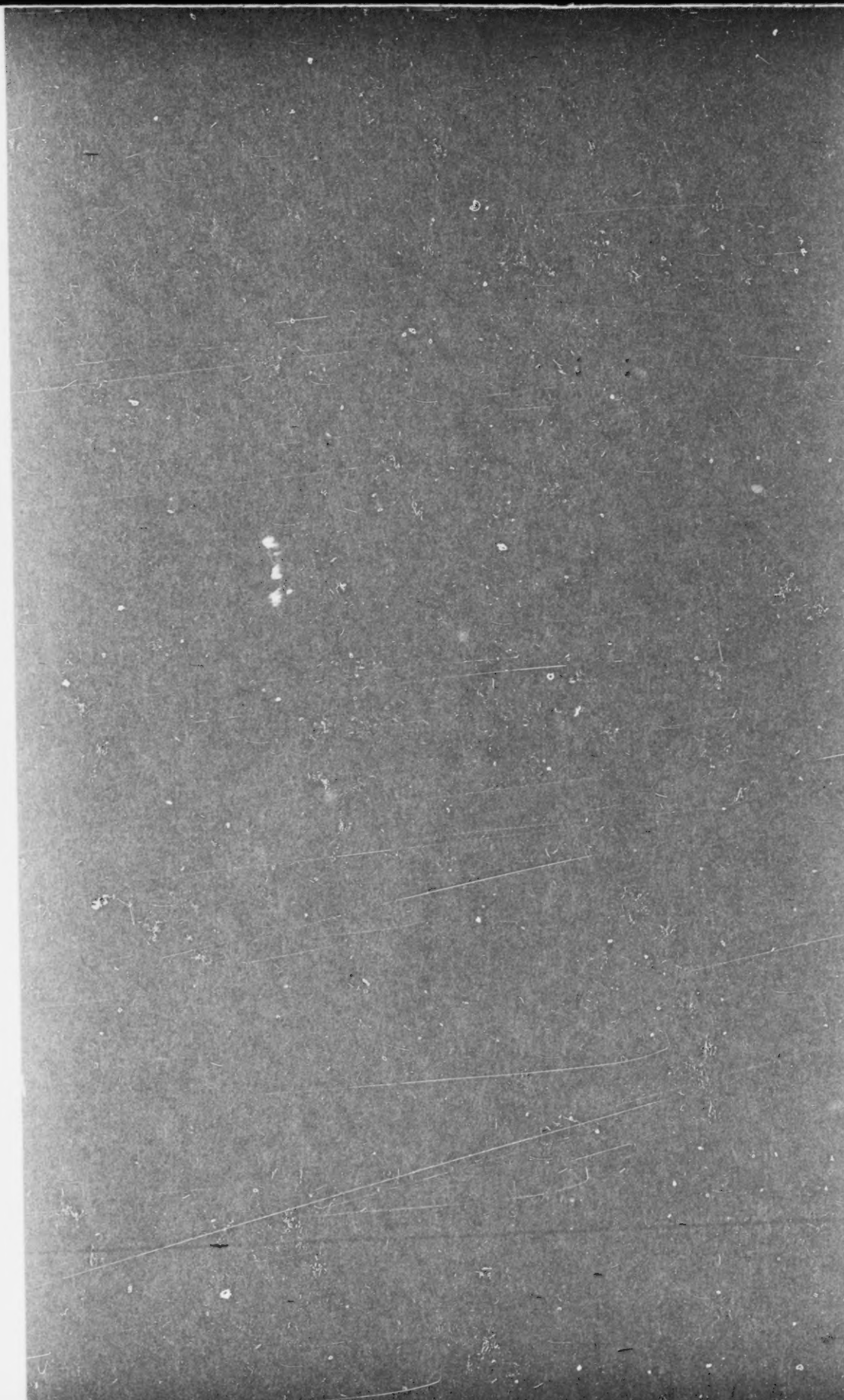
For the foregoing reasons, certiorari should issue to the Court of Appeals for the Eighth Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

JAMES J. WILSON
City Counselor
EDWARD J. HANLON
*JULIAN L. BUSH
SHERYL JOHNSON
Associate City Counselors
Room 314 City Hall
St. Louis, MO 63103
(314) 622-3361
Attorneys for Petitioner

*Counsel of Record

APPENDIX



APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 86-1359C(4)

VINCENT WILLIAMS EL,
Plaintiff,

vs.

DARREL JOHNSON, SAM SMITH, CLAUDE WOODSON, MRS. HARRIS, GEORGE KINSEY, ROSEMARY TERRANOVA and CITY OF ST. LOUIS,
Defendants.

JUDGMENT

(Filed: March 1, 1988)

This action came on for trial before the Court and a jury, Honorable Clyde S. Cahill, District Judge, presiding,

IT IS ORDERED and ADJUDGED that a verdict is directed in favor of all the defendants and against the plaintiff. Costs are not assessed and the complaint is dismissed on the merits.

EYVON MENDENHALL, CLERK

/s/ Craig Liddy
Deputy Clerk

Dated: 3-1-88

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1607

Vincent Williams-El,
Appellant,

v.

Darrell Johnson, Sam Smith, Claude Woodson,
Mrs. Harris, George Kinsey, Rosemay Terranova,
and City of St. Louis,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri.

(Submitted: December 15, 1988)
(Filed: April 5, 1989)

Before ARNOLD, Circuit Judge, BRIGHT, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

ARNOLD, Circuit Judge.

This appeal arises out of Vincent Williams-El's allegation that a correctional officer beat him while he was a pretrial detainee at the St. Louis Municipal Jail. Claiming his constitutional rights had been violated by the beating and subsequent denial of medical care, Williams-El sued the jailer, Darrell Johnson, his supervisor, Sam Smith, the superintendent of the St. Louis Medium Security Institution, Claude Woodson, a jail nurse,

Mrs. Harris, the St. Louis Director of Correctional Services, George Kinsey, the Director of the St. Louis Department of Welfare, Rosemary Terranova, and the City of St. Louis. At the close of the plaintiff's case, the District Court directed a verdict in favor of defendants Woodson, Harris, Kinsey, Terranova, and the City. At the close of all evidence, the Court directed a verdict in favor of the remaining defendants. On appeal, Williams-El contests all these rulings, save the one in favor of Woodson,[1] arguing that he made a submissible case against each of these six defendants. He also challenges various evidentiary rulings of the trial court. We reverse and remand with respect to defendant Johnson, and affirm with respect to the other defendants.

I.

On June 27, 1985, Vincent Williams-El was a resident of the St. Louis Municipal Jail, awaiting sentencing on a murder charge. According to Williams-El, he was waiting for his GED class to start, watching a TV set through a partition at the rear of the classroom, when, without provocation, Darrell Johnson, a jailer, grabbed him by the collar and pulled him to the floor. Williams-El lay there for about 15 seconds, while Johnson cursed him. When Williams-El tried to get up, Johnson punched him in the face four times. Williams-El fell backwards against a radiator and then slid to the floor. Johnson continued to attack Williams-El until he was stopped by other correctional officers. One of the other jailers, an Officer Love, shoved Williams-El into an elevator to separate the two men. Williams-El tripped on a mattress lying in the elevator and again landed on his back.

After the altercation, Williams-El was returned to his cell and placed in lock-down. Williams-El claims that at this time he

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[1] During the trial it became evident that Woodson had no authority over the St. Louis Municipal Jail. Apparently this is why Williams-El does not appeal the directed verdict in Woodson's favor.

asked Captain Smith, a supervisor at the jail, to get him medical treatment for his bruised back and split lip. Later, while still in lock-down, Williams-El complained to Nurse Harris of severe back pain and requested treatment. Williams-El claims that jail personnel were aware that he had a bullet lodged near his spine and heart from a shooting accident that occurred when he was a teenager. Yet, despite their knowledge of his preexisting condition and his requests for aid, jail officials never furnished Williams-El with any kind of medical treatment.

This account of the facts is the foundation of Williams-El's §1983 action, in which he alleges his constitutional rights were violated when Johnson punched him and when he failed to receive medical attention for his injuries. Williams-El contends that this occurred because Johnson, a recently hired correctional officer, was not qualified for the position and had received inadequate training in the correct use of force.[2] The City requires that its correctional officers possess high school diplomas or the equivalent. Johnson had not finished high school, nor did he have a strong employment record since dropping out of school. Guards were supposed to undergo a two-week training course in which they were taught the proper use of force and how to handle stressful situations. However, Johnson, a less than exemplary employee,[3] had not attended the course, though he had worked as a jailer for three months. Such a long period of employment without receiving academy training was

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[2] The jail's Chief of Security, Major Booker, conceded that if Williams-El's account of events is credited, Johnson used excessive force in subduing the prisoner.

[3] Johnson had received three ratings of "proficient" and thirteen of "meets standards" on his evaluation. "Meets standards" was the minimum rating an officer could receive and retain his position. If such an officer did not improve in six months to a year, he would be dismissed.

unusual. Tr. II at 35. Despite Johnson's lack of qualifications and training, however, he was the only guard responsible for a GED class of about twenty prisoners and a ward for mentally retarded inmates. Williams-El contends that these facts and circumstances give rise to liability on the part of Johnson, the City, and various supervisory personnel at the jail.

The defendants contest Williams-El's account of events in the GED room. Johnson filed an incident report which stated that at "[a]pproximately 4:50 p.m., [I] observed resident Vincent Williams in an unauthorized area while he was supposed to be in GED class. After instructing Resident Williams to move from the door[] he refused and opened the door[;] standing next to him[,] I reached around and closed the door. Resident Williams then straight arm pushed me . . . in the chest . . . clenching his opposite hand in a fist. I then struck him about the face[,] knocking him down. Resident Williams fell to the floor . . ." Plaintiff's Ex. 2. A use-of-force report, a part of the incident report was filed by Lt. Galloway and stated that "resident was instructed three times to take his seat and to stop disrupting class." Plaintiff's Ex. 4. When "the resident rushed with both hands closed and swinging wildly," then Johnson responded with "closed right hand." *Id.* In short, the defendants contend that Williams-El provoked and threatened Johnson, who had to punch Williams-El in the face to subdue him. Captain Smith testified that punching a prisoner in the face numerous times could be an acceptable use of force "if that's what it took." Tr. I at 74.

The defendants also offered a different version of the facts with respect to Williams-El's medical treatment. They claimed that Williams-El did not complain that his back had been injured, did not have a split lip, and did not request medical treatment. Indeed, when asked if he wanted medical attention, Williams-El declined it.

The defendants elaborate on Johnson's resume and training as well. They point out that Johnson was working toward his

GED while a jailer, and intended to acquire it during his probationary period. The defendants note that Johnson had taken a job as a security guard before coming to work at the jail. The defendants admit Johnson had not attended the academy for training, but explain that the two-week class was taught only when there were enough new guards to make holding the session worth while. In any case, Johnson was not without training and guidance: he had received on-the-job training, with an experienced officer accompanying him every time he worked a new floor. The defendants also contend that Johnson had received some instruction on the correct use of force, through either on-the-job training or the training manual.

These were the versions of events presented to the jury. At the close of plaintiff's case, the District Court granted a directed verdict in favor of defendants Woodson, Harris, Kinsey, Terranova, and the City. The Court explained that Williams-El had not shown that Woodson, Kinsey, Terranova, or the City were responsible for the hiring of unqualified guards. Tr. II at 92-93, 96. Nor had Williams-El proved that he had suffered a serious injury to which Nurse Harris was indifferent. *Id.* at 96. At the close of the defendants' case, the Court granted a directed verdict for Johnson and Smith, explaining that it simply did not believe Williams-El's account of events. *Id.* at 136-40. This appeal followed.

II.

Williams-El contends that the District Court erred in directing a verdict in favor of Johnson, arguing that under a correct application of directed-verdict law, he made a submissible case under §1983. We agree.

A trial court must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby,* 477 U.S. 242, 250 (1986). However, "[i]f reasonable minds could differ as to the importance of the evidence, . . . a verdict should not be directed." *Id.* at

250-51. When faced with a motion for a directed verdict, the trial court should view the evidence in the light most favorable to the nonmoving party, and give the nonmoving party the benefit of all favorable inferences reasonably to be drawn from the evidence. *Lang v. Cone,* 542 F.2d 751, 754 (8th Cir. 1976). Unless the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion, the motion for directed verdict should be denied. *Decker-Ruhl Ford Sales v. Ford Motor Credit,* 523 F.2d 833, 836 (8th Cir. 1975).

After reciting the *Anderson v. Liberty Lobby* standard for granting a directed verdict, the District Court held that "no reasonable jury would return a verdict in favor of this plaintiff." Tr. II at 136. The Court went on to explain in detail why it believed Williams-El's account of events was incredible. By making this explicit credibility judgment, the Court misapplied the standard for directing a verdict and invaded the province of the jury. Substantially different versions of the facts were presented in this case. The only fact agreed upon was that Johnson punched Williams-El in the face. How many punches were thrown under what provocation, and whether the punching was an excessive use of force were all hotly disputed. These questions should have gone to the jury and been answered by the jury.

Apparently recognizing that the Court's decision cannot be upheld under its stated rationale, the defendants seek to preserve the ruling by offering an alternative reason for the result. The defendants contend that because Williams-El could bring a state tort action that would adequately compensate him for his alleged injuries, he should be limited to that cause of action, and not be allowed to proceed under §1983. They cite *Parratt v. Taylor,* 451 U.S. 527 (1981).

In *Parratt,* the Supreme Court held that a plaintiff's procedural due process claim against prison officials was lacking in merit where there was an adequate state post-deprivation

remedy sufficient to compensate him for his injury. Though *Parratt* involved deprivations of property, the doctrine has been extended to deprivations of liberty as well. *Birkenholz v. Sluyter,* 857 F.2d 1214, 1217 (8th Cir. 1988); see also *Thomas v. Booker,* 784 F.2d 299, 310-11 (8th Cir.) (en banc) (Bowman, J., dissenting), *cert. denied,* 476 U.S. 1117 (1986). The defendants argue that because Williams-El could be fully compensated for his liberty deprivation by bringing a state tort action for battery, he should be limited to that remedy under the *Parratt* doctrine.

Before applying *Parratt v. Taylor* to this case, however, we must ask what kind of due process is involved, procedural or substantive. The *Parratt* doctrine has not been applied to questions of substantive due process, *Daniels v. Williams,* 474 U.S. 327, 338 (1986) (Stevens, J., concurring); *Wilson v. City of North Little Rock,* 801 F.2d 316, 321 (8th Cir. 1986), and the reason is clear. Procedural due process is about when and how the state may deprive a person of property or liberty; it involves the procedures a state must follow before a right is taken away. Substantive due process, on the other hand, proscribes "certain government actions regardless of fairness of the procedures used to implement them." *Daniels, supra,* at 331. What kind of due process claim does Williams-El make?

Williams-El was a pretrial detainee at the time of the incident. Under the Due Process Clause, a pretrial detainee may not be punished prior to an adjudication of guilt. *Bell v. Wolfish,* 441 U.S. 520, 535 (1979). The defendants argue that the pretrial detainee/prisoner distinction is procedure-based. Williams-El may be punished, but only after receiving the requisite process, *e.g.,* a trial. The defendants go on to argue that due process does not forbid the infliction of corporal punishment, since corporal punishment may even be administered to school children, see *Ingraham v. Wright,* 430 U.S. 651 (1977), if the proper procedures are followed. Indeed, the defendants argue, a convicted murderer would rather have a few punches in the face than a life sentence. Thus, defendants contend Williams-El's claim is properly characterized as a procedural-due-process case.

We do not accept the defendants' characterization of the issue. Prison-beating and police-brutality cases have long been brought under the Due Process Clause as violations of substantive, not procedural, due process. These cases involve deprivations of liberty that cannot be legitimized no matter how much process is given. See, *e.g.*, *Burton v. Livingston,* 791 F.2d 97, 100-01 (8th Cir. 1986); *King v. Blankenship,* 636 F.2d 70, 72-73 (4th Cir. 1980); *Johnson v. Glick,* 481 F.2d 1028, 1032-33 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973); *Collum v. Butler,* 421 F.2d 1257, 1259 (7th Cir. 1970); *Talley v. Stephens,* 247 F.Supp. 683 (E.D. Ark. 1965). If we were to hold that these injuries were compensable only under state law, then there could be no more §1983 actions to reform prison systems.

The defendants' final attempt to support Johnson's directed verdict is to argue that the jailer is entitled to qualified immunity. Citing *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), they argue that unless it was clearly established it was unconstitutional for a correctional officer to beat a prisoner unnecessarily, Johnson cannot be held liable. This proposition has long been clearly established, and so this argument must fail.

III.

Having established that the due-process case against defendant Johnson should have gone to the jury, we must now explore whether the same is true of Williams-El's claims against any other defendant. Williams-El contends that Johnson's behavior led to liability on the part of Smith, Kinsey, Terranova, and the City. We examine each of these arguments in turn.

Williams-El contends that, as a supervisor at the City jail, Smith was responsible for seeing to it that Johnson had the qualifications to handle the job. He argues that Smith knew Johnson had been working for only three months, lacked the requisite high school diploma, and had not attended the correctional officers' training academy, yet placed Johnson in charge

of twenty prisoners attending a GED class and an entire ward of mentally retarded inmates. Williams-El argues that Smith should have known that Johnson lacked the training to handle this potentially explosive situation, and that his actions constituted the deliberate indifference that gives rise to supervisor liability. See *Wilson v. City of North Little Rock*, 801 F.2d at 322.

First, we point out that Smith had no control over the hiring of correctional officers. He had no involvement at all in choosing among the applicants or in setting out the qualifications for the job. Second, Smith was not connected with the operation of the training academy. He was responsible for seeing to it that new jailers received on-the-job training, including training in the use of force, but Williams-El does not claim Smith was remiss in this area. As for the assignment of Johnson to controlling the GED class and mentally retarded ward, while Johnson was not a stellar employee, he was an adequate one, and he had not had trouble handling inmates before. Williams-El did not establish liability on the part of Smith.

George Kinsey was the Director of Adult Correctional Services for the City and, as appointing authority for the City, had the ultimate say over who was hired at the municipal jail. There was a requirement at the time Johnson was hired that correctional officers possess a high school diploma or its equivalent, yet Johnson was not a high school graduate. Also, Williams-El claims that Kinsey was directly responsible for the operation of the municipal jail and the work of its employees. Williams-El argues that Kinsey's liability stems from derelictions in these two areas.

Williams-El failed to make a submissible case against Kinsey. While we do not think the Constitution requires that correctional officers possess high school diplomas, we note that, in any case, Johnson was working toward his GED while employed at the jail. Apparently he had promised the City he would attain this certificate degree during his six months' pro-

bationary period. Also, evidence at trial showed that an L.T. Brown was the jail's superintendent, not Kinsey. Kinsey, in fact, had no direct responsbility for the city jail.

Williams-El's case against Rosemary Terranova is even more tenuous. Director of the Department of Welfare for the City, she was responsible for appointing Kinsey and for overseeing his performance. Respondeat superior is not an adequate basis for liability, *Monell v. New York Dept. of Social Services,* 436 U.S. 658, 694 (1978), and Williams-El does not show any other connection between her and the jail.

A "city cannot be held liable under §1983 unless [plaintiff] prove[s] the existence of an unconstitutional municipal policy." *City of St. Louis v. Praprotnik,* 180 S.Ct. 915, 926 (1988). Williams-El argues that two policies combined to cause Johnson to punch him and thereby violate the Constitution: (1) the City's policy of hiring inexperienced and undereducated correctional officers, and (2) its policy of giving these employees inadequate training. Certainly it is conceivable that a city's policies on hiring and training jail guards could be so inadequate as to trigger a §1983 violation. See, *e.g., Hirst v. Gertzen,* 676 F.2d 1252, 1263 (9th Cir. 1982). However, Williams-El does not demonstrate that the City of St. Louis had policies that were constitutionally deficient. First, we are not prepared to hold that the Constitution requires that a prison guard possess a high school diploma or that he attend a certain two-week training course. In any case, the stated policy of the City is in fact to hire correctional officers with high school diplomas, and to give them on-the-job and police-academy training. The written, official policy of a city is to be given great weight in determining what the city's policies are. *Cf. Praprotnik, supra,* at 926-27. Williams-El alleges only a single deviation from these written policies: the presence of Johnson at the jail. This single occurrence does not prove the existence of a custom or usage in conflict with the official policy, especially since Johnson's situation is not a clear case of the stated policy's being ignored. Though

hired without a high school degree, the City made plain to him that he had to obtain his GED within six months. And Johnson was not without training from the City, since he received on-the-job training. If he had remained at the jail longer, there is no reason to think he would not have attended the academy as well. We do not think Williams-El proved the City had unconstitutional policies.

IV.

Still to be addressed is Williams-El's other claim: that he received constitutionally inadequate medical attention after the incident. This claim is against defendants Smith and Harris.

Williams-El's cause of action fails because he cannot show that a serious medical need was ignored. Even if Williams-El's version of his injuries is given full credence, the most he can show is a split lip and a minor bruise to the back. Neither is a serious condition. To prove a constitutional violation, an inmate must show that prison officials were deliberately indifferent to his *serious* medical needs. *Estelle v. Gamble*, 429 U.S. 97 (1976) (emphasis added). Williams-El's claim fails with respect to Nurse Harris because he can prove neither a serious medical need nor deliberate indifference. She examined him after the altercation and found nothing wrong with him. Williams-El may disagree with her assessment of his condition, but this does not give rise to liability. *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988).

V.

Plaintiff also complains that certain evidence was wrongly excluded. First, Williams-El argues that he should have been allowed to present evidence of other instances where excessive force was used against prisoners by Johnson. Second, Williams-El contests the District Court's exclusion of three pieces of evidence related to Johnson's qualifications and con-

duct. Two of the items, Johnson's employment application and new-employee information form, were excluded as needlessly cumulative, since there had already been testimony to the facts contained in these documents. The third item was Johnson's performance notification and letter of resignation. A few days after punching Williams-El, Johnson failed to show up for work. He did not call in with an explanation or excuse. A few days later, he sent a letter of resignation. The District Court kept this evidence out, explaining that it was irrelevant to the question of whether Johnson beat up Williams-El.

We deem it inappropriate to rule on these evidentiary questions at the present time. They may not recur at the new trial, and if they do, the context will be different. Johnson will be the only defendant, so the argument that the evidence might be relevant to show other defendants' knowledge of Johnson's propensities will no longer be apposite. We are content, for the present, to leave these evidentiary matters to the sound discretion of the District Court if they again arise at the new trial.

The judgment is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1607

Vincent Williams-El,
Appellant,

vs.

Darrell Johnson, Sam Smith, Claude Woodson,
Mrs. Harris, George Kinsey, Rosemay Terranova,
and City of St. Louis,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

JUDGMENT

(Filed: May 27, 1989)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part and cause is remanded to the district court for proceedings consistent with the opinion of this Court.

April 5, 1989

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED: MAY 25, 1989

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1607

Vincent Williams-El,
Appellant,

vs.

Darrell Johnson, et al.,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

(Filed: May 1, 1989)

Appellant's petition for rehearing has been considered by the Court and is hereby denied.

May 1, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of
Appeals, Eighth Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1607

Vincent Williams-El,
Appellant,

vs.

Darrell Johnson, et al.,
Appellees.

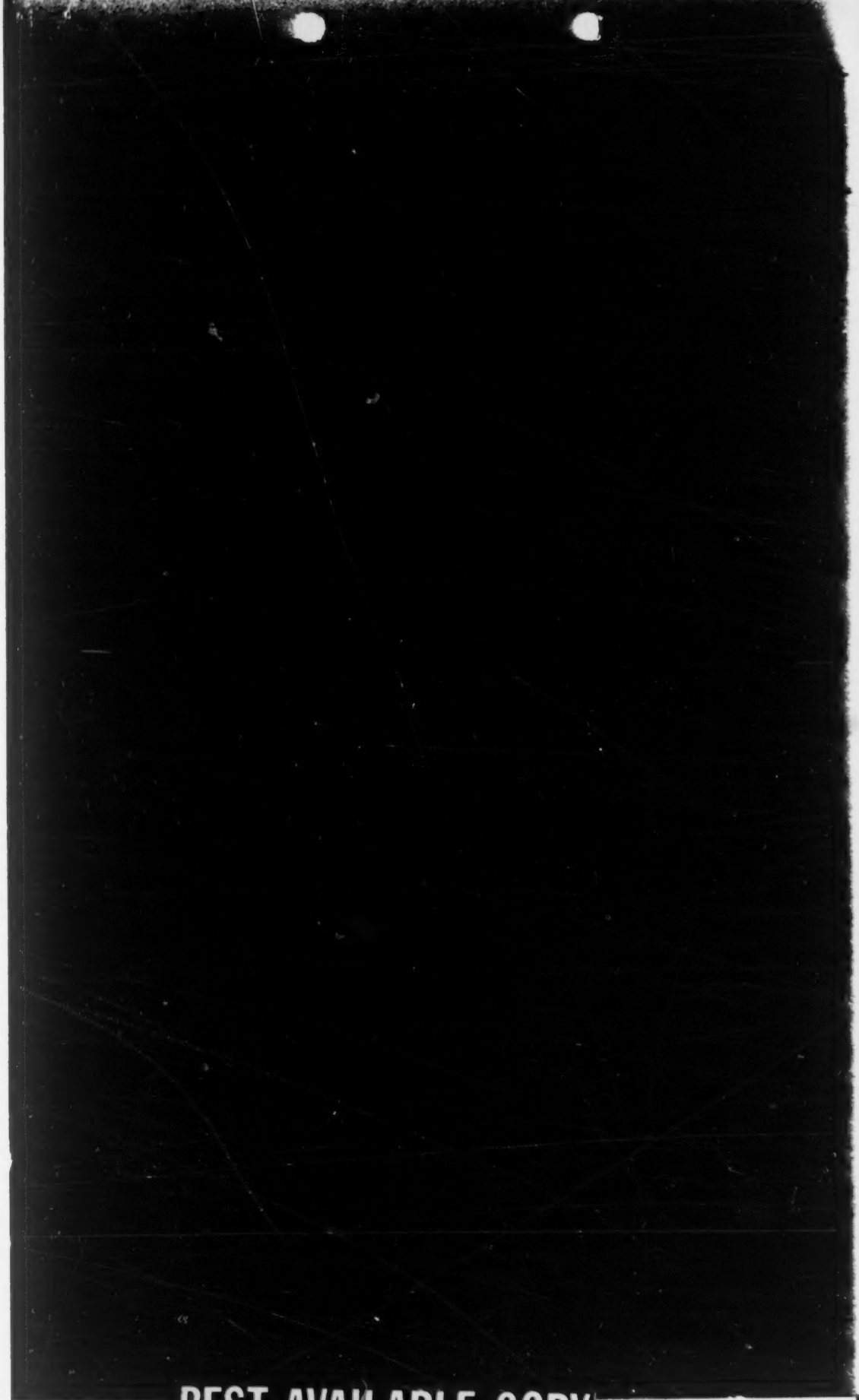
Appeal from the United States District Court
for the Eastern District of Missouri.

Appellees' petition for rehearing has been considered by the Court and is hereby denied.

May 16, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of
Appeals, Eighth Circuit.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QUESTION PRESENTED

Whether the punishment of a pretrial detainee implicates substantive due process, thus, making the doctrine of **Parratt v. Taylor** inapplicable.

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No.

In The
Supreme Court of the United States
October Term, 1988

Darrell Johnson

Petitioner

vs.

Vincent Williams-El

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes now Vincent Williams-El, respondent, and respectfully prays that this Court deny the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. III, Section 1, Cl 2 provides in pertinent part:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

U.S. Const., Amend, XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

In the opinion in the case at bar, the Eighth Circuit correctly held that a pretrial detainee had a liberty interest in not being assaulted by a correctional officer. In addition, that court held that deprivation of that liberty interest would implicate substantive due process.

In reaching this conclusion, the Eighth Circuit followed precedent in its own circuit as well as precedent in many other circuits. This court has also reviewed this question in **Bell**

v. **Wolfish**, 441 U.S. 520 (1979) and **United States v. Salerno**, 481 U.S. 739 (1987). Although this Court has not specifically ruled on this issue both opinions indicated that substantive due process would apply to pretrial detainees.

Given the above, the questions presented by petitioner are not important or unsettled questions of federal law, and need not be reviewed by this Court. Further, petitioner does not even have standing, pursuant to Article III of the United States Constitution, to challenge one of the issues decided by the Eighth Circuit as that Court ruled in petitioner's favor.

I.

WHETHER PETITIONER HAS STANDING TO CHALLENGE THE RULING OF THE COURT BELOW, WHICH FOUND THAT PARRATT V. TAYLOR, 451 U.S. 527 (1981) AND HUDSON V. PALMER, 468 U.S. 517 (1984) APPLY TO CASES INVOLVING A DEPRIVATION OF LIBERTY AS WELL AS A DEPRIVATION OF PROPERTY, WHEN THE COURT BELOW RULED IN PETITIONER'S FAVOR ON THIS ISSUE.

Rule 17 of the Supreme Court Rules sets out the several different (nonexclusive) reasons that the Supreme Court will look at when considering a Writ of Certiorari. One of the reasons which is considered important enough for the Supreme Court to grant review of a Writ of Certiorari is when a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter. See, Rule 17.1(a) of the Supreme Court Rules.

Petitioner argues, in the case at bar, that it is an unsettled question of federal law whether the **Parratt** doctrine, which involves deprivation of property, is equally applicable to cases involving a liberty interest. Petitioner also states that the circuits are split on this question. (Petition for Writ of Certiorari p. 5). While, it is true that this issue is an unsettled question of federal law and it is also true that the circuits are split on this particular question, petitioner does not have standing to bring that question before this Court. Consequently, this Court does not

have jurisdiction under Article III of the United States Constitution.

In terms of Article III, standing is characterized as:

> "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of the federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf".

Warth v. Seldin, 422 U.S. 490, 498-499; 45 L.Ed.2d 343; 95 SCt. 2197 (1975) {emphasis in the original}.

When a plaintiff's standing is brought into issue, the relevant inquiry is whether assuming justiciability of the claim, the plaintiff has shown an injury to himself as likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitations. See, **Simon v. East Kentucky Welfare Rights Organization**, 426 U.S. 26; 48 L.Ed. 2d 450; 96 S.Ct. 1917 (1976).

In the case at bar, petitioner has not been injured by the Eighth Circuit's ruling on the **Parratt** doctrine. One of petitioner's arguments was that this case involved a deprivation of liberty and the **Parratt** doctrine should apply to liberty interests as well as property interests. The court below agreed with this argument and found that **Parratt** applies to liberty as well as property deprivations. However, the court concluded that **Parratt** did not apply in this particular case because the issue before that court was not a procedural question but was rather one of substantive due process.

Since, on this particular issue, the Eighth Circuit ruled in petitioner's favor, the petitioner does not have a personal stake in the outcome of this issue. Petitioner has not been injured, therefore, he should not be allowed to invoke the jurisdiction of this court because any review of this issue would be inconsistent with the mandates of Article III.

II.

THE QUESTION OF WHETHER THE PUNISHMENT OF PRETRIAL DETAINEES IMPLICATES SUBSTANTIVE DUE PROCESS RIGHTS, AND THUS, IS NOT SUBJECT TO THE STRICTURES OF THE PARRATT DOCTRINE, IS NOT AN UNSETTLED QUESTION OF FEDERAL LAW, AND DOES NOT NEED TO BE REVIEWED BY THIS COURT.

This Court has clearly ruled on the issue of whether substantive due process applies to pretrial detainees. In, **Bell v. Wolfish**, 441 U.S. 520; 60 L.Ed. 2d 447; 99 S.Ct. 1861 (1979), the Court stated that:

> "[U]nder the due process clause, a detainee may not be punished prior to an adjudication of guilt."

In, **United States v. Salerno**, 481 U.S. 739; 95 L.Ed. 2d 697; 107 S.Ct. 2095 (1987), this Court implied that the impermissible punishment of a pretrial detainee would be considered violative of substantive due process. In, **Salerno**, however, the Court did not rule on this question because the Court did not find a "punishment", but rather based its decision on the ruling that the federal law complained of was regulatory in nature.

Many lower courts, faced with the issue of a correctional officer's brutality towards a pretrial detainee have based their analysis directly on the due process clause. These courts have found that the pretrial detainee has a substantive right under the due process clause of the Fourteenth Amendment which protects them from "punishment" prior to an adjudication of guilt. See, **Madden v. City of Meriden**, 602 F.Supp. 1160 (D.Conn. 1985); **Johnson v. Glick**, 481 F.2d 1028 (2d. Cir. 1973), cert denied, 414 U.S. 1033 (1973); **H.C. By Hewett v. Jarrard**, 786 F.2d 1080 (11th Cir. 1986); **Schillingford v. Holmes**, 634 F.2d 263 (5th Cir. 1981).

In **Daniels v. Williams**, 474 U.S. 327; 88 L.Ed.2d 662; 106 S.Ct. 662 (1986), Justice Stevens stated in his concurring opinion, that an action would be considered violative of the substantive component of the due process law,

> "If the Federal Constitution prohibits a State from taking certain actions regardless of the fairness of the procedures used to implement them."

Id. at 338.

In the case at bar, the substantive component of the due process clause is clearly implicated. Respondent was beaten by a guard while he was a pretrial detainee. He was deprived of his liberty interest in being free from assaults by correctional officers, and no amount of procedure could legitimize that deprivation of liberty.

Petitioner wishes to characterize the "punishment" of respondent as a violation of procedural due process, and thus call the **Parratt** doctrine into play. However, prison-beating cases have long been brought under the due process clause as a violation of substantive due process. In addition, this type of case involves the deprivation of liberty that can never be corrected no matter how much "process" is given. See, **Madden v. City of Meriden**, 602 F.Supp. 1160 (D.Conn.).

Petitioner criticizes the Eighth Circuit for relying on Eighth Amendment cases in ruling on this issue. (Petition for Writ of Certiorari p. 9). This criticism is unfounded. Several courts have held that Eighth Amendment standards can be used by analogy to determine the minimum substantive rights of a pretrial detainee under the due process clause of the Fourteenth Amendment. **Rhem v. Malcolm**, 507 F.2d 333 (2d Cir. 1974); **Madden v. City of Meriden**, 602 F.Supp. 1160 (D.Conn. 1985); **Hamm v. Dekalb County**, 774 F.2d 1567 (11th Cir. 1985) cert. denied 975 U.S. 1096; 106 S.Ct. 1492; 89 L.Ed. 2d 894 (1986).

Given the above, it was perfectly proper for the Eighth Circuit to rely on Eighth Amendment cases in ruling on this issue. Therefore, the cases cited by the lower court are valuable precedent and should not be overlooked by this court. See, **Burton v. Livingston**, 791 F.2d 97 (8th Cir. 1986); **King v. Blankenship**, 636 F.2d 70 (4th Cir. 1980); and **Talley v. Stephens**, 247 F.Supp. 683 (E.D. Ark. 1965).

Finally, petitioner claims that this case is not a substantive due process case, but is rather a procedural due process case that has been mischaracterized. This allegation, however, is without merit.

As stated earlier, the "punishment" of a pretrial detainee, prior to the adjudication of guilt, implicates the substantive due process clause. See, **Bell v. Wolfish**, 441 U.S. 520; 60 L.Ed. 2d 447; 99 S.Ct. 1861 (1979). In the case at bar, no amount of "process" can remedy the deprivation of respondent's liberty interest. Therefore, this claim could not possibly be characterized as anything but a violation of substantive due process.

CONCLUSION

For the forgoing reasons, certiorari should be denied, as there are no important or unsettled questions of federal law to be reviewed by this Honorable Court.

Respectfully submitted,

By: Kevin P. Schnurbusch

*Kevin P. Schnurbusch
Marcia A. Goldsmith
314 N. Broadway, 16th Fl.
St. Louis, MO 63102
(314) 771-6470
Attorneys for Respondent

*Counsel of Record

AFFIDAVIT OF SERVICE

Kevin P. Schnurbusch, being duly sworn, upon his oath states that two (2) copies of the foregoing Respondent's Brief in Opposition to the Petition for Writ of Certiorari were served this 20th day of July, 1989 by mailing same to Julian J. Bush, Associate City Counselor, City Hall, Room 314, St. Louis, Missouri 63103.

Kevin P. Schnurbusch

Kevin P. Schnurbusch #33243

Subscribed and sworn to before me this 20th day of July, 1989.

Irene A. Johnson

Notary Public

IRENE A. JOHNSON
NOTARY PUBLIC – STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXPIRES OCT. 19, 1993

My Commission Expires:

Supreme Court, U.S.
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JUL 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRELL JOHNSON,
Petitioner,

VS.

VINCENT WILLIAMS-EL,
Respondent.

PETITIONER'S REPLY BRIEF

JAMES J. WILSON
City Counselor
EDWARD J. HANLON
Associate City Counselor
*JULIAN L. BUSH
Associate City Counselor
SHERYL Y. JOHNSON
Associate City Counselor
Room 314 City Hall
St. Louis, MO 63103
(314) 622-3361
Attorneys for Petitioner

*Counsel of Record

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314 231-4477

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PETITIONER'S REPLY BRIEF

1. Petitioner has presented the Court with the following question: "Whether the doctrine of *Parratt v. Taylor* is applicable to the random and unauthorized punishment of a pretrial detainee." Petition, p. 1. However, as petitioner explained, the resolution of that question requires, as a matter of logic, the resolution of three subsidiary questions: a) whether *Parratt* applies to liberty interests as well as property interests; b) whether *Parratt* applies to substantive due process as well as procedural due process; and c) whether the punishment of pretrial detainees implicates substantive due process or procedural due process. Petition, pp. 4-12. Indeed, petitioner believes that one of the virtues of his petition is that resolution of the question presented not only permits but requires resolution of the three subsidiary questions, each an important and unresolved question of federal law. Yet respondent argues that this Court is without jurisdiction to consider and resolve the

subsidiary question of whether *Parratt* is applicable to liberty interests and he argues that petitioner cannot challenge the Eighth Circuit's holding that it is. Respondent misunderstands both petitioner's position and this Court's jurisdiction.

First, petitioner does not challenge the Eighth Circuit's holding that *Parratt* is applicable to liberty interests; petitioner agrees that it is; indeed, petitioner's position that the *Parratt* doctrine is applicable to pretrial detainees requires acceptance of the Eighth Circuit's holding in that respect. Second, the Court has jurisdiction to determine any question essential to the analysis of the decision below, *United States v. Mendenhall,* 446 U.S. 544, 551 n.5 (1980), and determination of whether or not *Parratt* is applicable to liberty interests is essential to the analysis of whether the Eighth Circuit properly decided that *Parratt* is inapplicable to detainees.

2. Respondent next argues that the question of whether the punishment of pretrial detainees implicates procedural due process or substantive due process is settled and that it is settled that such punishment implicates substantive due process. Respondent first relies on what he believes are implications in this Court's opinions in *Bell v. Wolfish,* 441 U.S. 520 (1979) and *United States v. Salerno,* 481 U.S. 739 (1987). However, as petitioner has already argued, the *Bell v. Wolfish* court's reliance on *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963) suggests the opposite implication from that which respondent seeks to draw. Petition, p. 10. And, in *Salerno,* the most that the Court's opinion can be fairly read to show is that the Court accepted the proposition arguendo.

Respondent next relies on a miscellany of older district court and court of appeals opinions that have treated the rights of pretrial detainees as the same as those that prisoners enjoy under the Eighth Amendment. This error, which is identical with that committed by the court below in this case, is akin to that condemned in *Graham v. Connor,* 490 U.S. ____, 104

L.Ed.2d 443, 109 S.Ct. ____ (1989). That this error continues to be committed in the wake of *Graham* demonstrates that this question is unsettled and ought to be decided by this Court.

Respectfully submitted,

JAMES J. WILSON
City Counselor
EDWARD J. HANLON
*JULIAN L. BUSH
SHERYL JOHNSON
Associate City Counselors
Room 314 City Hall
St. Louis, MO 63103
(314) 622-3361
Attorneys for Petitioner

*Counsel of Record